LAM ENG RUBBER FACTORY (M) SDN BHD

v.

TRIBUNAL RAYUAN LEMBAGA GETAH MALAYSIA; SAFIC ALCAN (MALAYSIA) SDN BHD (INTERVENER)

HIGH COURT MALAYA, PULAU PINANG
MOHD NOOR ABDULLAH J
[NO: 25-48-00]
9 JUNE 2003

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Whether application for judicial review wrong in law - Whether jurisdiction of High Court to issue certiorari appellate or supervisory - Whether principles of natural justice complied with - Whether court had jurisdiction to hear application*

This was an application by the applicant for an order of *certiorari* to quash the decision of the respondent dismissing the appeal by the applicant against certain arbitration awards handed down in relation to contracts between the intervener and applicant. The intervener had entered into five different contracts with the applicant for the sale and delivery of raw rubber that were subject to the Malaysian Rubber Exchange Rules and Bye Laws. A dispute arose in relation to the said contracts, and as a result, the dispute was referred to arbitration. The arbitrators found the applicant to be in breach of the said contracts due to its failure to deliver the rubber as agreed. The applicant subsequently appealed to the respondent which dismissed the appeal; hence, this application. In this present application, the intervener raised a preliminary objection that the application for judicial review in this action was wrong in law. However, the main issue in this application was whether this court had the jurisdiction to hear the applicant's application for judicial review.

Held:

[1] The intervener's submission that the present application was wrong in law was misconceived. As the subject matter of the said contracts was raw rubber, the present action was governed by the Malaysian Rubber Exchange (Incorporation) Act 1962, and regulated by the Malaysian Rubber Exchange Rules and Bye Laws; s. 24(2) of the Arbitration Act 1952 and O. 69 r. 4 of the Rules of the High Court 1980 had no application in this present action. (p 601 c-f)

[2] The jurisdiction of the High Court to issue *certiorari* is neither appellate nor revisional in nature, but supervisory, and as such, the court does not interfere with tribunals merely because a decision is erroneous. In the present application, the applicant was essentially asking for a re-evaluation of the findings of fact, which were findings that were immunised from judicial review. (pp 604 g, 605 a, g & 606 d)

[3] On the point of natural justice, the facts showed that the rule of hearing had been complied with, and the rule against bias was merely a suspicion that remained unsubstantiated by the applicant. (pp 606 g & 607 a)

[4] In conclusion, this court had no jurisdiction to hear this application, and for it to do so would be to enlarge its supervisory powers beyond the ambit of judicial review. (p 607 b)

[Application dismissed.]

Case(s) referred to:

Airspace Management Services Sdn Bhd v. Col (B) Harbans Singh Chingar Singh [2000] 4 CLJ 77 CA ***(foll)***

Non-Metallic Mineral Products Mfg Employees Union v. South East Asia Fire Bricks Sdn Bhd [1976] 2 MLJ 69 ***(refd)***

OSK & Partners v. Tengku Noone Aziz [1983] 1 CLJ 288; [1983] CLJ (Rep) 317 FC ***(refd)***

Petaling Tin Bhd v. Lee Kian Chan [1994] 2 CLJ 346 SC ***(refd)***

Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2000] 2 CLJ 244 CA ***(foll)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(foll)***

Sangram Singh v. Election Tribunal AIR [1955] SC 425 ***(foll)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 24(2)

Malaysian Rubber Exchange (Incorporation) Act 1962, s. 94

Rules of the High Court 1980, O. 69 r. 4

For the applicant - Nicholas Tan; M/s Gan Teik Chee & Ho

For the respondent - Manjit Singh Saini; M/s Harun Idris, Yeoh & Partners

For the intervener - CH Low; M/s Sidek, Teoh, Wong & Dennis

Reported by Suresh Nathan

JUDGMENT

Mohd Noor Abdullah J:

This is an application (encl. 7) by Lam Eng Rubber Factory (M) Sdn. Bhd. (applicant) for an order of *certiorari* to quash the decision of the Tribunal Rayuan Lembaga Getah Malaysia (respondent) dated 4 September 2000 which dismissed the appeal by the applicant against the Arbitration award No. 1/2000, 2/2000, 3/2000, 4/2000 and 5/2000 dated 3 May 2000 in relation to the dispute between the applicant and Safic-Alcan (Malaysia) Sdn. Bhd. (No. Syarikat 38200-P) of the five sale and purchase contracts of raw rubber No. 99/LB/601960/LB, 99/LB/602066/LB, 99/LB/602077/LB, 99/LB/602087/LB and 99/LB/602068/LB.

Background Facts

Safic-Alcan (Malaysia) Sdn. Bhd. entered info five different contracts with the applicant for the sale and delivery of raw rubber in 1999. These contracts were subject to the Malaysian Rubber Exchange Rules and Bye Laws. A dispute arose in relation to the said contracts. As a result, the dispute was referred to arbitration under Bye Law 7, Part C, Section 1, Malaysian Rubber Exchange Rules and Bye Laws.

On 3 May 2000, the arbitrators found the applicant to be in breach of the said contracts for the failure to deliver the rubber as agreed and is liable to compensate Safic-Alcan with costs as follows:

Award No.	Contract	Damages
(a) 1/2000	Contract 1	RM 41,046.70
(b) 2/2000	Contract 2	RM619,500.00
(c) 3/2000	Contract 3	RM185,325.00
(d) 4/2000	Contract 4	RM323,000.00
(e) 5/2000	Contract 5	RM 59,860.00

A total sum of damages awarded was therefore RM1,228,731.70. An appeal was lodged with the respondent and on 4 September 2000, the appeal was dismissed. In the present action, Safic-Alcan who is the intervener raised a preliminary point on the jurisdiction of the court to hear this matter by way of judicial review. The issue in this action as well as the appeal against the decision of this court is whether the court has the jurisdiction to hear the applicant's application for judicial review.

The Law

(a) Procedural Point

The intervener submits that the application for judicial review in this action is wrong in law. The counsel contends that where the applicant seeks to-set aside the said arbitrator's awards dated 3 May 2000, the applicant should have filed an application under O. 69 r. 4 of the Rules of the High Court to be read together with s. 24(2) Arbitration Act 1952. Under O. 69 r. 4, any application to remit any award under s. 23 Arbitration Act 1952 or any application to set aside an award under s. 24 Arbitration Act 1952 must be filed within six weeks after the publication of the award to the parties. With respect, in my view the intervener's submission is misconceived. The Arbitration Act 1952 relates to' arbitration generally and O. 69 Rules of the High Court 1980 provides for arbitration proceeding in Court; whereas the Malaysian Rubber Exchange (Incorporation) Act 1962 provides specifically for the settlement of disputes by arbitration and the establishment of Arbitration Tribunal to deal with the dispute and the provision for appeals by an Appeal Tribunal. The main prayer by the Applicant in this action is for a writ of *certiorari* to quash the decision of the Tribunal Rayuan Lembaga Getah Malaysia, the Appellate board. Since the Malaysian Rubber Exchange (Incorporation) Act 1962 is a special statute, which provides for arbitration and appeal, the Arbitration Act 1952 and O. 69 has no application at all in this present action.

As the subject matter of the said contracts is raw rubber, the present action is governed by the Malaysian Rubber Exchange (Incorporation) Act 1962, (Act 402) and regulated by the Malaysian Rubber Exchange Rules and Bye Laws. It has its own arbitration provision in s. 94 which states:

(1) In the event of any dispute or difference arising either between a Member and the Corporation or between any two or more Members as to:

(a) the construction or interpretation of these Rules or any bye-laws or regulations made thereunder or of any alteration or modification thereto; or

(b) their several rights, privileges, obligations or liabilities arising out of any contract or business made or transacted through or under the trading regulations of the market; or

(c) any other matter whatsoever affecting the rights, privileges, obligations or liabilities of the Members or any particular category or claims;

such dispute or difference shall be referred to arbitration in accordance with the provisions of this Rule and (subject to any right of appeal from the decision of the Arbitrator or Arbitrators provided for hereunder) the award made upon the determination of such arbitration shall be final and binding on all parties concerned.

(2) The Board may make such bye laws or regulations as it deems fit to provide for the setting up of an Arbitration Tribunal or Tribunals for the purpose of dealing with any dispute or difference to be referred to arbitration under the provisions aforementioned to provide for the procedure to be followed upon any such reference to arbitration, the fees to be paid in respect of arbitration proceedings, appeals from awards, the enforcement of awards and generally for the carrying into effect of the provisions of this Rule.

Under the Malaysian Rubber Exchange Bye-Laws, Part C, Section 1 is the provision for arbitration.

Para (g) provides as follows:

Procedure for Appeals

(i) Every award of a sole arbitrators or two arbitrators or their umpire shall be final unless within seven business days from the date of service of notification by the Chairman or his Deputy that such award is ready for delivery the disputants or one of them lodges an appeal with the Chairman or his Deputy, and at the same time, deposit with the Chairman or his Deputy a sum as determined by the Management Committee for such purposes.

Any sum so deposited may be retained by the Corporation or dealt with by the Management Committee in such manner as it thinks fit.

(ii) Every appeal properly preferred shall be decided by an Appeal Tribunal, hereinafter constituted, whose decision(s) shall be final and conclusive.

Judicial Review: The Law

It is submitted that the Malaysian Rubber Exchange is a corporation established by Malaysian Rubber Exchange (Incorporation) Act 1962 and the Malaysian Rubber Board is established under the Malaysian Rubber Board (Incorporation) Act 1996. The panel of arbitrators are appointed thereunder. They perform a public function and their powers are regulated by bye-laws and statutes and they have a duty to act judicially. Accordingly, the applicant's counsel submits that they are therefore subject to judicial review.

Over the years, judicial review has made inroads into various statutory bodies, public or otherwise such as clubs, societies and associations. They are expected to follow the procedural fairness when they take actions which will affect the right and interest of their members.

For example, the Federal Court in *OSK & Partners v. Tengku Noone Aziz* [1983] 1 CLJ 288; [1983] CLJ (Rep) 317 held that *certiorari* could be issued to quash a decision of the Kuala Lumpur Stock Exchange as it is a hybrid corporation, namely a company incorporated under the Companies Act regulated by the Securities Act.

Edgar Joseph Jr. SCJ stated in *Petaling Tin Bhd. v. Lee Kian Chan* [1994] 2 CLJ 346 has this to say about judicial review:

> The Court of Appeal held that the self regulatory panel was deemed to be engaged in a public faw activity in its regulation of the financial markets. That it would be unthinkable to allow it to be cocooned from the attention of the courts and so the courts had jurisdiction to review the panel's decision to dismiss the applicant's complaints.
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> Undoubtedly, the significance of Datafin. is that it marks a further extension of boundaries of the court's jurisdiction in cases of judicial review which springs from a desire to avoid the exercise of extensive power which is not subject to the supervision of the courts.

I think it is pertinent to note the observations of Lord Denning in the case of *R v. Medical Appeal Tribunal, ex p Gilmore* (1957):

> ... the remedy of *certiorari* is never to be taken away by any statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal'. It does not mean 'without recourse to *certiorary*". **It makes the decision final on the facts, but not final on the law**. Notwithstanding that the decision is by a statute made final, ***certiorari*** **can still issue for excess of jurisdiction or for error of law on the face of the record** ... (my emphasis).

The Court of Appeal in the *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union* [1995] 2 CLJ 748 where Gopal Sri Ram JCA said:

> In my judgment, the true principle may be stated as follows: An inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether these error of law is jurisdictional or not. If an inferior tribunal or other public decision maker does make such an error, then he exceeds his jurisdiction. So too is

> jurisdiction exceeded where resort is had to an unfair procedure, or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision. Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunised from judicial review by an ouster clause however widely drafted.

These are some of the authorities which set out the trite law pertaining to the extent of the High Court's power in judicial review. They described the circumstances under which judicial review can be made. However it is pertinent to note that in *Quah Swee Khoon v. Sime Darby Bhd.* [2001] 1 CLJ 9 where it was held that:

> It is not open for a Court, in judicial review proceedings to exercise appellate powers. If a judge to whom an application for *certiorari* inquiries into and disturbs finding of facts based on the credibility of witnesses, he is actually exercising appellate functions. Therefore, it must be concluded that the finding of perversity is merely a guise for interfering with findings that are only capable of being corrected in the exercise of appellate jurisdiction. As such, the learned judge had clearly exceeded the parameters of its *certiorari* jurisdiction in quashing the award on this ground.

Similarly, in *Airspace Management Services Sdn. Bhd. v. Col. (B) Harbans Singh a/l Chingar Singh* [2000] 4 CLJ 77, the Court of Appeal held:

> It is well settled that a court cannot utilise *certiorari* proceedings as a cloak to entertain what, in truth, is an appeal against findings of fact. If authority is needed for that proposition, it may be found in the decision of the Indian Supreme Court in *Basappa v. Nagappa* AIR [1954] SC 440 and in *Dharangadhru Chemical Works. Ltd, v. State of Saurashtra & Ors.* AIR [1957] SC 264.

Hence, the jurisdiction of the High Court to issue *certiorari* is supervisory, it is neither appellate nor revisional jurisdiction. The significance of this issue of jurisdiction is emphasised in the case of *Non-Metallic Mineral Products Mfg. Employees Union v. South East Asia Fire Bricks Sdn. Bhd.* [1976] 2 MLJ 69.

> The supervisory character is essential for always in the background there is the beguiling illusion that an inferior tribunal entrusted to hand down awards of a final nature may hand down awards as it likes. Therefore, the jurisdiction may for convenience be described as an extraordinary original jurisdiction.

Because of its supervisory role, the court does not interfere with tribunals merely because a decision is erroneous. *Certiorari* is therefore not issued as a matter of right but only on limited grounds as mentioned in the said cases.

In this present action, the grounds relied on in support of the application by the applicant are as follows:

(i) The arbitrators erred when they decided that the applicant is liable for the arbitrator award No. 1/2000 although Safic-Alcan (Malaysia) Sdn. Bhd. failed to give directions as to the delivery within the agreed period.

(ii) The arbitrators had erred when they decided that the Applicant is liable for the arbitrator award No. 2/2000, 3/2000 and 4/2000 for deliveries for the month of January 2000 although Safic-Alcan (Malaysia) Sdn. Bhd. cancelled the said orders at the very last minute.

(iii) The arbitrators had erred when they decided that the applicant was liable for the arbitrator award No. 2/2000, 3/2000 and 4/2000 for deliveries for the month of February 2000 without considering whether there was 'force majeure' and that the applicant was prepared to meet its obligations thereafter.

(iv) The arbitrators had erred when they ordered the applicant to pay the whole award for the deliveries for the month of March 2000 without considering the fact that the applicant had paid to Safic-Alcan (Malaysia) Sdn. Bhd. a sum of RM19,341.99 on 19 April 2000 as profits from the 'selling off of the delivery for the month of March 2000.

(v) The arbitrators had erred when they decided that the applicant is liable for the arbitrator award No. 5/2000 although Safic-Alcan (Malaysia) Sdn. Bhd. failed to give directions as to the said delivery within the extended period.

What the applicant in effect is asking in its application for judicial review is essentially the re-evaluation of the findings of facts. Whether there were deliveries or not, are findings of facts. Again whether there were cancellation of orders or lack of instructions in relation to deliveries are finding of facts based on documentary evidence and witnesses.

To re-emphasise these points, Bose J in S*angram Singh v. Election Tribunal* AIR [1955] SC 425 at p. 429 had this to say:

> That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. That High Courts do not, and should not, act as Courts, of Appeal under Art. 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily and one of the limitations imposed by the courts upon themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion .injustice in a broad and general sense.

Further, in *Petroliam Nasional Bhd. v. Nik Ramli Nik Hassan* [2000] 2 CLJ 244, the Court of Appeal said that:

> He has submitted, quite rightly, that once the Industrial Court made an evaluation rightly or wrongly and had arrived at a finding of fact, that finding was immunized from judicial review (see also the *State of Madras v. G. Sundaram* AIR [1966] SC 103. *William, Jacks & Co. (M) Sdn. Bhd. v. S. Balasingam* [1997] 3 CLJ 235).

On Natural Justice

On the point on natural justice, the applicant submits that no reasons were given for the decision arrived at by the respondent, the Appellate Tribunal.

One must appreciate that natural justice is a procedural concept and does not impose any substantive restriction on the decision-making body. It furnishes no basis to probe into the merits of a decision made by an authority. In other words, it does not dictate the quality of the decision.

Natural justice has two main components:

(i) the rule of hearing or *audi alterem partem* ie, the rule that no one is to be condemned unheard; and

(ii) the rule against bias, ie, *nemo judex in cuasa sua,* ie, no one may be a judge in his own cause.

I believe the first component is fully complied. The applicant has the right to be heard and even the avenue of being heard at appeal stage before the respondent.

As to the fact that one of the managers is in the panel of arbitrators, he was not the one to hear the dispute. Further, all these appointments are done by the Management Committee. This is merely a suspicion, unfounded and unsubstantiated.

Having considered all these points, I am of the opinion that this court has no jurisdiction to hear this application. To do so would be to enlarge its supervisory powers beyond the ambit of judicial review.